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### Repairing the engine of cassation

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## **REPAIRING THE ENGINE OF CASSATION:**

Form and function of the adjudication of the Hoge Raad and its Parket

Marc A. Loth<sup>1</sup>

### *1. Introduction*

1. The adjudication of the Hoge Raad (Dutch Supreme Court) was once called “the engine of cassation”.<sup>2</sup> This metaphor suggests that it is this adjudication that keeps the legal system going; indeed, one can state without exaggeration that the Hoge Raad has played a considerable role in the development of Dutch civil and criminal law. It must also be acknowledged, however, that serious doubts currently exist as to whether it can continue in this capacity without requiring considerable reform. And if the engine of cassation needs to be repaired, we will have to reassess the Hoge Raad’s function in the Dutch legal system, as well as examine how the form of its rulings contributes to that function.

2. The starting point is the notion that the form of judicial rulings – at least those of the Hoge Raad – cannot be properly understood without taking the purpose of its adjudication into consideration. Thus, I will begin with a brief sketch of the function of the Hoge Raad and the Parket (Board of Procureur-Generaal and Advocaten-Generaal) in light of their most pressing problem: the increasing caseload (par. 2). I will address the formal and informal instruments that have been put into place to keep up with the growing stacks of files. Next, I will analyse the form of the rulings of the Hoge Raad from that perspective (par. 3). We will see a strong tendency for diversification here, in the sense that unimportant cases are decided with little or even no reasoning, and leading cases are reasoned extensively. Finally, I will address the proposals for reform to meet today’s challenges (par. 4), the most prominent of which are a moderate leave to appeal system and the use of concurring and dissenting opinions.

It is stated in the seminar’s introduction paper that the tendency in the UK is towards

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<sup>2</sup> Freek Bruinsma, *Cassatierechtspraak in civiele zaken, een rechtssociologisch verslag*, Zwolle: W.E.J. Tjeenk Willink 1988, Chapter 2.

composite judgments. Interestingly enough, we will see that in the Netherlands an opposite tendency exists, towards the introduction of concurring and dissenting opinions. As in the case of the UK, this development needs clarification and explanation.

## *2. Function of the Hoge Raad and its Parket*

3. For a proper understanding of the character of the Hoge Raad as a court of cassation, it is useful to begin with a historical remark.<sup>3</sup> Cassation is of course a French invention, founded on the idea to safeguard the correct and uniform application of the law. This innovation turned out to have export value as well, since it was copied by Italy, Spain, Portugal, Belgium, and the Netherlands. Though the Dutch did translate this idea into the Judicial Organisation Act 1827, they were the first to diverge substantially from the French example. In order to prevent the situation in which a case was sent back and forth between the court of appeal and the court of cassation after it was quashed by the latter - which was a serious problem for the French Cour de cassation - the Hoge Raad was given the authority to rule on a case decisively if that were possible based on the facts established by the lower courts. This extension of power was considered acceptable, since the constitution of that time prescribed that each judicial ruling had to be reasoned, with the consequence that this reasoning was under review by the Hoge Raad.<sup>4</sup> This determined the character of the review right from the start. First, the Hoge Raad is formally a court of cassation – and not one of final appeal or revision – but in practice its review resembles revision, in the sense that its rulings can end the trial definitely and decisively.<sup>5</sup> Second, a review by the Hoge Raad is closely connected to the

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<sup>3</sup> Asser procesrecht/Veegens - Korthals Altes - Groen (2005), nrs. 6 and 9.

<sup>4</sup> Art. 173 Constitution 1815.

<sup>5</sup> The difference being that courts of final appeal consider questions of fact as well as of law and replace the decision of the lower court with their own; courts of revision also commonly replace the decision of the court below with their own but consider only questions of law. Courts of cassation consider only questions of law but simply quash a defective decision; they cannot substitute their own decision and must remit the case for fresh decision elsewhere (See J.A. Jolowicz and C.H. van Rhee, *Recourse against judgments in the European Union*, The Hague: Kluwer Law International 1999, p. 2). The difference is, however, to be nuanced: "In general, however, the procedure recognized as cassation in many European countries today has moved so far from the original model of post-Revolutionary France that the differences between cassation, on the one hand, and Revision or even appeal, on the other, are significantly reduced"

requirements of judicial reasoning by the lower courts. As we will see, control of the reasoning of the lower courts is one of the main instruments to fully grasp the factual grounds of their rulings (see par. 6).

4. Despite several discussions on institutional reform in the nineteenth century, the position of the Hoge Raad has been firmly established. It is currently generally acknowledged as the apex of the judicial pyramid, which consists of five courts of appeal and nineteen courts of first instance. As a court of cassation, the Hoge Raad has two main responsibilities: legal protection on the one hand and legal uniformity and law development on the other. Compared to its original function – legal uniformity – this entails an extension, and one that creates tensions. Legal protection asks for the correction of inevitable mistakes made by appeal courts, such as neglecting crucial statements made by the parties, incomprehensible reasoning, trespassing the limits of the conflict, and disregarding established rules. Law development asks for the formulation of hard and fast rules, rules of thumb, catalogues of circumstances, instructions, and so forth. Though these two ambitions are necessarily connected, it is difficult to achieve both at the same time; the more seriously that legal protection is taken, the more cases it invokes, and the less time remains for law development. However, if law development is given priority, then this will inevitably force attention away from the regular pile of cases at the cost of legal protection. This dilemma with regard to legal protection and law development is a crucial one that divides both the academic and the judicial community.<sup>6</sup>

5. Thus far, the Hoge Raad seems to have managed well in its double ambition, despite an increasing caseload. A few figures will illustrate this: in 1973, the civil chamber had to deal with 158 cases, the criminal chamber with 560, and the tax chamber with 284. By 2007, the numbers of these of cases had increased to 582, 3864, and 752 respectively.<sup>7</sup> The Hoge Raad itself has grown at a much slower rate, since it wants to remain small for reasons of coordination. In the meantime, it has

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(ibid. p. 2 and 3). The Netherlands is an example.

<sup>6</sup> J.M. Barendrecht, *De Hoge Raad op de hei, kwaliteitsbewaking en leiding over de rechtspraak door de civiele cassatie; een analyse en denkrichtingen voor de toekomst*, Zwolle: W.E.J. Tjeenk Willink 1998, ch. 1.

<sup>7</sup> The figures come from the Hoge Raad. See *Versterking van de cassatierechtspraak, rapport van de commissie normstellende rol van de Hoge Raad*, Den Haag, februari 2008, p. 15.

succeeded in keeping up with the growing caseload, thanks to a combination of formal and informal instruments. Three formal instruments have been implemented. First, oral pleadings have almost completely been abolished. The Hoge Raad works behind “a paper wall”, as the saying goes, which means that it judges on files only. Second, the possibility has been introduced to deal with simple cases by a seat of three judges instead of the usual five. At present, one third of the cases are judged by a seat of three.<sup>8</sup> Finally, in the 1980s a new legal provision was introduced – now Article 81 of the Judicial Organisation Act – which allows the Hoge Raad to reject a claim without reasoning if no questions of legal uniformity or law development are involved.<sup>9</sup> This provision is not in any way a limitation of the access to the Hoge Raad, but it does save considerable time and energy that would otherwise be spent on hopeless cases. It is used in cases of obviously failing complaints against decisions of law or failing complaints against the reasoning of predominantly factual decisions. The number of cases rejected without reasoning increased from 13 percent in 1997 to 27 percent in 2000.<sup>10</sup>

6. The most important informal mechanism to influence the caseload of the Hoge Raad is, of course, the possibility to interpret its own ‘Kompetenz-Kompetenz’. As a court of cassation, the Hoge Raad deals only with matters of law, not with matters of fact. However, the question of what is a matter of fact is a legal one, to be addressed through the channel of complaints against the reasoning of the appealed decision. In general, the Hoge Raad demands that a ruling give insight into the reasons of the court, so that the decision is made controllable and acceptable to the parties and others involved, including the higher court.<sup>11</sup> A reasoning can be rejected if it is considered incomprehensible, and it is sustained if it is regarded as ‘not incomprehensible’. As a result, there is an extended doctrine as to what is factual and what is not.<sup>12</sup> The review of the reasoning of the appealed rulings places the

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<sup>8</sup> See W.D.H. Asser, H.A. Groen, J.B.M. Vranken m.m.v I.N. Tzankova, Een nieuwe balans, interim-rapport fundamentele herbezinning Nederlands burgerlijk procesrecht, Den Haag: Bju 2003, p. 214.

<sup>9</sup> Art. 81 RO.

<sup>10</sup> Asser/Groen/Vranken, a.w., p. 214.

<sup>11</sup> HR 4 juni 1993, NJ 1993, 659 (m.nt. DWFV).

<sup>12</sup> The extension of the legal at the expense of the factual is another reason that the distinction between courts of final appeal, revision and cassation, is not as sharp as it used to be (See J.A. Jolowicz and C.H. van Rhee, Recourse against judgments in the European Union, The Hague: Kluwer Law International 1999, p. 3).

Hoge Raad in a position of marginal control, in which it is able to redress incorrect factual decisions of lower courts. At the same time, it is able to influence its own caseload; when it extends the lines further, more cases are included, control over lower courts is strengthened, and legal protection is improved. When the Hoge Raad narrows its domain, fewer motivation claims succeed, the caseload shrinks, and there is more room for law development. It is common knowledge that considerations concerning caseload play a substantial role in deliberations in chambers.

7. The Hoge Raad could not possibly cope with the growing caseload without the help of the Parket. It is an independent office, separate from both the Hoge Raad itself and the Public Prosecutions Office from which it originated.<sup>13</sup> As a residue of these roots, the Procureur-Generaal still has certain special authorities, such as to prosecute ministers, secretaries of state, and members of parliament for crimes committed in the course of their duties before the Hoge Raad, and to file disciplinary complaints against judges in the Hoge Raad. The Parket consists of 20 members: the Procureur-Generaal, his substitute, and 18 Advocaten-Generaal. Their most important task is to write Conclusions in individual cases, which serve the Hoge Raad as an advisory expert opinion. The Parket always writes a Conclusion in civil and criminal cases, but in tax cases only when it is thought necessary or useful. Over the years, the Conclusion has developed from a short legal opinion to an extensive scholarly treatise on the legal questions involved. Though it is an opinion of a magistrate advising on the desired outcome of the case, it is written in a very personal style.

8. The Conclusion serves several purposes for the Hoge Raad. First, it is helpful in settling preliminary questions, such as whether the case should be judged by a seat of three or five judges, or whether the complaints can be rejected without reasoning. Second, it informs the court during its first deliberation, especially in the civil chamber where there is no 'raadsheer-rapporteur'. The judges take the Conclusion as a starting point and determine whether they can follow it. If they do, the Conclusion helps the judge who is to write the draft; if they do not, it serves as a kind of dissenting opinion. Third, the Conclusion addresses all complaints, which the Hoge

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<sup>13</sup> Art. 111 RO.

Raad does not always do. The disappointed party can read already in the Conclusion the result of his complaints, as is the case when the complaints are rejected without reasoning.<sup>14</sup> If the parties want to respond to the Conclusion – which appears before the ruling – this is allowed by the *Borgers* decision of the ECHR<sup>15</sup>, reconfirmed for civil cases in the *Vermeulen* decision.<sup>16</sup> They are allowed to write a ‘Borger letter’ to the Hoge Raad, which will be taken into consideration before decision. All in all, the Conclusion is of the utmost importance for the quality of the ruling. The Advocaten-Generaal are excellent jurists, selected for their specialisations and assisted by bright young assistants. They also have more time available than does the Hoge Raad for research and reflection.

### *3. Form of the Hoge Raad rulings*

9. Hoge Raad rulings were originally apodictic decisions, written in an indirect mode (‘considering that...’) and in an archaic style. Since the 1980s, they have been written in a direct mode, according to a uniform format: (1) the trial in previous instances, (2) the trial in cassation, (3) the judgment of the means or grounds of cassation, and finally (4) the decision.<sup>17</sup> The core of the reasoning is, of course, the judgment of the means (or grounds) of cassation. In essence, the reasoning consists of a series of deliberated decisions on the means or grounds of cassation, that the plaintiff has put forward. The reasoning of the Hoge Raad is in that sense a logic of cassation.<sup>18</sup> One could say that this logic is not the deductive logic of the syllogism (like that of the French Cour de cassation) but the dialectic logic of the trial, since the Hoge Raad responds to the grounds of cassation. If the means or grounds are properly formulated and put forward in a systematic order, the Hoge Raad usually follows this order. If it is more convenient, however, they are grouped together in the line of

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<sup>14</sup> See Daan Asser, *Cassatie in civiele zaken (Nederlands recht)*, in: *De werkwijze van de hoogste rechtscolleges, preadviezen voor de vergelijkende studie van het recht van België en Nederland*, Den Haag: Bju 2007, p. 189-192.

<sup>15</sup> ECHR 30 oktober 1991, *Borgers/Belgie*, Serie A, Vol. 214-B; NJ 1992, 73.

<sup>16</sup> ECHR 20 februari 1996, *Vermeulen/Belgie*, Reports 1996-1, p. 224.

<sup>17</sup> Asser *procesrecht/Veegens - Korthals Altes - Groen* (2005), nr. 182 and 183. See also the added ruling of the Hoge Raad in the *Baby Kelly* case.

<sup>18</sup> See also Daan Asser, *Cassatie in civiele zaken (Nederlands recht)*, in: *De werkwijze van de hoogste rechtscolleges, preadviezen voor de Vereniging voor de vergelijkende studie van het recht van België en Nederland*, Den Haag: Bju 2007, p. 223, 224. Again, this is displayed in the added ruling of the Hoge Raad in the *Baby Kelly* case.

reasoning of the Hoge Raad. For civil cases, several ‘models of reasoning’ – as the former President of the Hoge Raad, S.K. Martens, called them<sup>19</sup> – can be distinguished. In the event that an appeal is rejected, the reasoning can take either the form of an attack on the means or grounds of cassation or a reformulation of the appealed ruling of the court of appeal. In the event that an appeal is sustained, there is only one alternative to the judgment of one or more complaints, and that is the independent reasoning of the Hoge Raad. The model of reasoning that is applied in a specific case is a matter of the logic of cassation.

10. Since the Hoge Raad has become more aware of its responsibility with regard to law development, the breadth of its rulings has increased. Sometimes the Hoge Raad lectures the lower courts, summarising its jurisprudence on a specific topic.<sup>20</sup> At other times it addresses society at large, especially in cases with important societal meaning. In those cases, the Hoge Raad does not reason only for the judicial and academic community. At the same time, the nature of the arguments changes; they are not only of a legal character but are of a political, moral, and pragmatic nature as well. The best example in recent years is the Wrongful Life (Baby Kelly) case, which was decided in 2005 (and which is added in translation to this article).<sup>21</sup> It concerned a pregnant woman who consulted her midwife because there had been two cases of chromosomal disorder-related handicaps in her husband’s family. The midwife did not think it necessary to investigate the matter further. This was later considered to be a professional failure with dramatic effects. After baby Kelly was born, she suffered severely from physical and mental handicaps. The parents claimed damages – both on their own and on Kelly’s behalf – and their claims were sustained by both the court of appeal and the Hoge Raad. However, the Hoge Raad addressed not only the strictly legal issues but also considered the moral and pragmatic arguments brought forward against these claims. First, there was the moral opposition that sustaining a claim like this acknowledged that not being born is preferable to living in a condition like Kelly’s (see considerations 4.4, 4.10 and 4.15). Second, there was the pragmatic argument that sustaining a claim like that would

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<sup>19</sup> S.K. Martens, *Motivering van uitspraken van de cassatierechter*, in: *Gemotiveerd gehuldigd*, opstellen aangeboden aan mr. C.D. Boeschoten, Zwolle: Tjeenk Willink 1993, p. 145.

<sup>20</sup> For example HR 3 oktober 2000, NJ 2000, 721, and HR 12 maart 2002, NJ 2002, 317.

<sup>21</sup> HR 18 maart 2005, LJN AR5213 (baby Kelly). See Marc A. Loth, *Limits of private law: enriching legal dogmatics*, Erasmus Hofstra Law lectures 1, Den Haag: Bju 2007.



envoke claims of children in Kelly's position against their parents (consideration 4.16), and would tempt doctors to practice 'defensive medicine' to avoid serious risk (consideration 4.17). All these arguments were carefully examined and rejected, which means that the Hoge Raad is definitely crossing legal boundaries in a clear attempt to convince the public of the moral rightness of its ruling. Of course, this is an exceptional case, but the awareness of the social impact of its decisions has grown. Perhaps one can even say that in cases like this one the Hoge Raad is undertaking moral leadership, guiding the discussion on central moral values in a divided society.

11. This means that the obiter dictum is in use, especially if considered useful for legal certainty, uniformity, or law development. The Hoge Raad frequently gives instructions in the case of a reference to a lower court – especially if the appealed decision is quashed – so that the lower court knows how to continue the trial. But what kind of sources does the Hoge Raad refer to in its rulings? First and foremost, these are laws and treaties, but also the “travaux préparatoires” of both. Second, they are legal rulings of the European courts but most of all of the Hoge Raad itself; sometimes just to clarify its position, sometimes to narrow or widen a given rule for the case at hand. If the Hoge Raad changes its course, it now always does this explicitly, in order to clarify its previous and new position.<sup>22</sup> This does not happen often, of course, but more frequently than it once did. The Hoge Raad rarely refers to foreign judgments. Third, the Hoge Raad refers to legal doctrine as well, although this is rarely specified. The research of legal doctrine, comparative law, and the Hoge Raad's own jurisprudence is better specified in the Conclusion of the Advocaat-Generaal, which is of course written for this purpose. On occasion, the Hoge Raad also refers explicitly to the Conclusion of the Advocaat-Generaal, especially if it rejects complaints on the grounds mentioned in the Conclusion; however, the Hoge Raad never enters into a discussion with the Advocaat-Generaal. This is somehow considered to damage the authority of the Hoge Raad, which is questionable at present. All in all, the motivations of the Hoge Raad are more extensive than those of the Cour de cassation but are more restricted than those of the Bundesgerichtshof (Federal Court of Justice of Germany).

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<sup>22</sup> The first example of this good tradition was HR 7 maart 1980, NJ 1980, 353 (Stierkalf).

12. In the discourse on the jurisprudence of the Hoge Raad, a crucial role is played by the annotations, which are written by legal scholars. An annotation is an expert comment on the ruling, which usually tries to explain it by reconstructing the line in the jurisprudence of which it is part. This presupposes an interpretation of both the ruling and its doctrinal meaning, sometimes resulting in a critical evaluation. Annotations are widely read by the academic and judicial community, including the judges of the Hoge Raad. Thus, they perform a double function: they translate the rulings for a non-expert audience while they vitalise discussion on the jurisprudence of the Hoge Raad. As such, they form a link between the individual rulings of the Raad and the legal doctrine of which they are part on the one hand, and the academic and judicial forum on the other. Like the Conclusion of the Advocaat-Generaal, the annotation is an individualised opinion by an expert, to a certain extent making up the lack of concurring and dissenting opinions. If we want to compare the collegial decision-making of the Hoge Raad with, for example, the individualised decision-making of the House of Lords, we must not overlook the crucial role played by the Conclusion and the annotation, both for the rulings of the Hoge Raad and for the wider legal and social debate.<sup>23</sup>

13. A much debated issue is of course whether the Hoge Raad should proceed 'one case at a time' – to use Cass Sunstein's phrase – or hand down deeper and broader rulings that serve as precedents for the future.<sup>24</sup> The overall impression is that the Hoge Raad – like many other high courts – generally stays on the safe side and only delivers broad and deep rulings if the issue at hand is not controversial and if developments have come to an end, consequences are foreseeable, and there is consensus in chambers.<sup>25</sup> Some writers point to the downside of this conservative tendency, asking that attention be paid to the social costs involved (in the form of legal uncertainty) in such a minimalist approach. One has even gone so far as to question the added value of an institution like the Hoge Raad.<sup>26</sup> Of course it is not

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<sup>23</sup> See for the French 'bifurcation' Mitchell de S. -O.-L'E. Lasser, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*, Oxford: Oxford University Press 2004, p. 27-62.

<sup>24</sup> Cass R. Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court*, Cambridge (Mass.)/London: Harvard University Press 1999.

<sup>25</sup> See Asser procesrecht/Veegens - Korthals Altes - Groen (2005), nr. 184, and M.A. Loth, *Rechtsvinding door de Hoge Raad; de breedte en/of de diepte in?*, in: *Trema* 2007/8, p. 317-326.

<sup>26</sup> J.M. Barendrecht, *Wat als de civiele kamer van de Hoge Raad er niet meer zou zijn?*, in: *Raad*

difficult to downsize its importance, both for the quality of the judicial adjudication (less than one in a thousand cases reaches the Hoge Raad) and for the development of the law (only a few guiding rulings a year). And there is no denying that the position of the Hoge Raad is under pressure with regard to developments in the judicial organisation. On the one hand, the European courts are of growing importance for Dutch national law (and they are not restricted to cassation), while on the other hand, lower courts seek refuge in judicial coordination to obtain legal uniformity in the form of judicial guidelines. This last development is stimulated by a new organ, the Raad voor de Rechtspraak, which was attributed by the legislator the power to facilitate and enhance the uniform application of the law.<sup>27</sup> The question arises as to whether a need still exists for a court of cassation, and if so, what its proper place and role in our modern legal system should be. How to maintain or repair the engine of cassation? This brings me to the third and last topic of my paper: the proposals for reform.

#### *4. Proposals for reform*

14. Although traditionally in a system of cassation the function of control prevails over the function of law development, the tide is now turning.<sup>28</sup> In the Netherlands, the Hoge Raad is seeking to strengthen its normative role in the legal system, and in 2007 a special committee was installed to investigate how to achieve that goal. In February of 2008, the committee Hammerstein (named after the chairman, a judge in the Hoge Raad) produced a report that was generally well accepted.<sup>29</sup> It seeks a new balance between legal protection on the one hand and legal uniformity and law development on the other. The latter should be strengthened, it claims, and the former should be restricted to what is needed to serve the quality of the adjudication, thus ignoring lesser mistakes in the rulings of lower courts. This rebalance is considered necessary, both to strengthen the authority of the Hoge Raad as well as to deal with the progressively larger caseload. The general impression is that the

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& Daad, over de rechtsvormende taak van de Hoge Raad, W.M.T. Keukens en M.C.A. van den Nieuwenhuizen (red.), Nijmegen; Ars Aequi libri 2008, p. 39-55.

<sup>27</sup> Art. 94 RO.

<sup>28</sup> See asser/Groen/Vranken, a.w., p. 211 e.v.

<sup>29</sup> Versterking van de cassatierechtspraak, rapport van de commissie normstellende rol Hoge Raad, februari 2008.

Hoge Raad deals with a growing number of cases that lack substantial relevance and that the limits of Article 81 (decision without motivation) have been reached. However, cases that do matter do not always reach the Hoge Raad in time.

15. In the aforementioned report, three proposals are made.<sup>30</sup> First, it is suggested to have the incoming cases selected 'at the gate', by three newly established selection chambers for civil, criminal, and tax cases, respectively, on the basis of a flexible criterion. The chamber is to decide whether the case is admissible, against which decision no provision is to be allowed. This will, of course, save both the court and the parties considerable work, time, and money, and will free the caseload of the Hoge Raad and the Parket of a pile of useless appeals. This proposal is seen by the committee as a further step on the road from Article 81 to a moderate form of a leave to appeal system. Second, the proposal addresses the problem that not all cases that do matter reach the Hoge Raad in time. To resolve this, it is suggested to improve an existing provision, which is called 'cassatie in het belang der wet' ('cassation in the interest of the law'). This is a special form of appeal in cassation, executed by the Procureur-Generaal, on the ground that the law has been violated by a ruling of a lower court, against which none of the parties has appealed to the Hoge Raad. If the Hoge Raad quashes the ruling on the appeal of the Procureur-Generaal, this decision can in no way influence the position of the parties involved. The provision is seldom used, not only because the Procureur-Generaal and the Hoge Raad are busy with the regular appeals but also because the rulings that qualify do not always come to the attention of the Procureur-Generaal. Therefore it is suggested to establish a special committee of judges and legal scholars to advise the Procureur-Generaal on the use of this provision. Third, it is advised to investigate whether it is worthwhile to introduce the possibility of preliminary rulings at the request of a lower court (comparable to those of the ECJ). This of course would enhance the role of the Hoge Raad in the decision-making process of lower courts, but it could also contribute to a substantial delay in the trials before the lower courts. Numerous questions – mostly of a procedural nature – need to be addressed before this proposal can be put forward seriously.

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<sup>30</sup> Ibid.

16. Last, but certainly not least, the composite character of the judgments of the Hoge Raad is discussed at length. The judgments are not without criticism. Sometimes they disappoint because they tend to be both one-sided (focusing on the decision, leaving out counterarguments) and bleak (expressing consensus, leaving out anything controversial). In addition, they are framed in a language that is difficult for anyone but insiders to understand. For these reasons, discussion emerges from time to time on the desirability of the use of concurring and dissenting opinions. Could that lead to a more balanced reasoning in a more comprehensive style, as in many other jurisdictions?<sup>31</sup> Only recently the discussion has been taken up again by Judge Wilhelmina Thomassen of the Hoge Raad, who was inspired by her experience in the ECHR in Strassbourg. She considers that the use of concurring and dissenting opinions would improve the reasoning of the Hoge Raad (forcing its members to address each other's arguments), would serve the quality of its decisions (resting on a more extensive and coherent reasoning), would enhance the public trust in adjudication (since the public recognises the different societal opinions in the ruling of the court), and would contribute to law development and legal certainty (fueling discussion on the different options). The general idea is that the quality, transparency, and legitimacy of the judgments are better served by clear statements of opposing standpoints than by a bleak compromise suggesting a fictitious consensus.<sup>32</sup> This sounds reasonable enough. However, counterarguments exist.

17. Apart from those of a practical nature – 'We already have the Conclusion of the Advocaat-Generaal' or 'Doesn't it take too much time?' – two arguments of principle oppose Judge Thomassen's plea. The first is that the separate publication of concurring and dissenting opinions would be a violation of the secrecy of deliberation in chambers, which has a long tradition and is even guaranteed by Dutch law.<sup>33</sup> Is this a strong argument? I think not. The secrecy of deliberation is not absolute, since that would hinder even the publication of the decision itself. However, the

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<sup>31</sup> Zie J.P. Fockema Andrea, *Het geheim van de raadkamer*, Utrecht: boekhandel De Vroede 1934, J.C.M. Leyten, *Dissenting opinion (I) en (II)*, *Nederlands Juristenblad* 1972, p. 697-707 en p. 731-741, *Preadviezen H. Drion en O. de Savornin Lohman*, *Handelingen Nederlandse Juristenvereniging* 1972, p. 3-78.

<sup>32</sup> W.M.E. Thomassen, *Het geheim van de raadkamer en de dissenting opinion*, in: *NJB* 2006, p. 686-690.

<sup>33</sup> Art. 7 lid 3 RO. The secrecy of deliberation was only lifted briefly in France and the Netherlands shortly after the French revolution.

abolishment of secrecy does not have to be radical, since that would result in a public deliberation by the judges. Between these two extremes one can imagine a partial lifting of the secrecy.<sup>34</sup> Different jurisdictions know different systems of concurring and dissenting opinions, some of which imply public deliberation, others imply no deliberation (the “*seriatum* opinion”), and again others rest on a mixture. For the Dutch situation, a mix would be the most appropriate one, in which concurring and dissenting opinions are published – after the discussion is closed – together with the court decision. The secrecy of deliberation would therefore still extend to the actual course of the deliberation as well as to the role different judges play in the process. This would be most convenient for the participating judges, since it would keep their contribution to the discussion secret while allowing them at the same time to express publicly their individual opinions in the ruling. It would benefit society as well, since it would serve the demands of transparency and open discussion in a democratic and open society. On the whole, a mixed system like this seems most appropriate to serve the legitimate interests of both the judges involved as well as society at large. It does presuppose, however, a more restrictive interpretation of the principle of secrecy of deliberation than we know now.<sup>35</sup>

18. The second argument against the introduction of concurring and dissenting opinions is the authority of the Hoge Raad. Is it to be expected that this authority is better served by it speaking with one voice in a composite judgment or by it speaking with several voices in various, sometimes opposing opinions?<sup>36</sup> The answer to this much debated question depends strongly on the specific circumstances of time and place. There was a time, and there are jurisdictions, where a univocal authoritative decision is essential for the authority of the high court. However, I believe that in a pluralistic society like ours concurring or dissenting opinions – if used prudently – will contribute considerably to the authority of the court. In a sense, it is a natural consequence of the central meaning we attribute to the motivation of the decision. If this is such an important part of the ruling, as we rightly stress, why do we stop

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<sup>34</sup> J.C.M. Leyten, Dissenting opinion (I), in: NJB 1972, p. 700.

<sup>35</sup> See W.D.H. Asser, *Het geheim van de raadkamer en de vrijheid van publicatie*, in: NJB 2006, p. 691-695.

<sup>36</sup> The first opinion is defended by H. Winkel, *De bewaring van het raadkamergeheim*, in: I.J. Dutihl e.a (red.), *Met eerbiedigende werking, opstellen aangeboden aan prof. mr. L.J. Hijmans van den Bergh*, Deventer: Kluwer 1971, p. 405-418, met name p. 406. The second by Fockema Andrea, see note 26.

halfway and incorporate only a few of the relevant reasons? The answer is explanatory but not justifying: the fact that we stop halfway can only be explained by the fact that two opposite sets of logic are in conflict here. On the one hand, there is the logic of reason, which requires a maximum of reasoning from all involved. On the other hand, there is the logic of power, which requires that the trial end with an authoritative decision, resting on a majority vote. The introduction of concurring and dissenting opinions would constitute a further shift in the balance between both sets of logics.<sup>37</sup> The shift from apodictic decisions in an apodictic style to the more reasoned rulings of today (to which I referred earlier, see par. 9) would imply a further shift towards the acknowledgement that, despite extensive deliberation, two worthwhile, reasoned solutions can co-exist.<sup>38</sup>

19. Though the arguments are in favour, tradition is at odds with the introduction of concurring and dissenting opinions.<sup>39</sup> First, the use of these opinions originates from Common Law jurisdictions, and at first glance it does appear to be misplaced in a Civil Law jurisdiction. To make the case for concurring and dissenting opinions, we need to argue that the responsibility of the Hoge Raad with respect to law development resembles that of, for instance, the US Supreme Court or the House of Lords. Although we have acknowledged that the tide is turning at the Hoge Raad – in the sense that it is seeking a new balance between legal protection and law development (see par. 14) – it remains to be seen whether the comparison with the Common Law courts holds. Second, the use of concurring and dissenting opinions seems most appropriate in jurisdictions in which the high court is authorised to undertake constitutional reviews, as in the United States or Germany. The Dutch Constitution, however, explicitly forbids a constitutional review of statutes by the judiciary, on the ground of the primacy of Parliament.<sup>40</sup> Still, the Hoge Raad – like the lower courts – is authorised to review statutes in the light of directly applicable provisions of treaties, such as the Treaty of Rome 1950.<sup>41</sup> Although the Hoge Raad is not a constitutional court, it does have experience with review in the light of

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<sup>37</sup> As H. Drion calls it: 'a more dialoging reason' (H. Drion, *Preadvies Handelingen der Nederlandse Juristen-Vereniging* 1973, deel 1, eerste druk, p. 46).

<sup>38</sup> J.C.M. Leyten, *Dissenting opinions* (II), in: *NJB* 1972, p. 736.

<sup>39</sup> J.C.M. Leyten, *Dissenting opinions* (I), in: *NJB* 1972, p. 705, 706.

<sup>40</sup> Art. 120 Constitution.

<sup>41</sup> Art. 94 Constitution.

fundamental rights, with a comparable impact as constitutional review. Third, making the case for the introduction of concurring and dissenting opinions requires further research into the question of whether this would coincide with the constitutional position of the Hoge Raad. The fact that the Hoge Raad is a court of cassation could, however, also be seen as an advantage in this respect. The restriction to legal questions seems a welcome prerequisite for the introduction of concurring and dissenting opinions, since it makes little sense to dissent on the facts of a case.<sup>42</sup>

## *5. Conclusion*

20. Among insiders, it is generally accepted that the engine of cassation needs to be repaired if the Hoge Raad is to continue to fulfill its significant function in the Dutch legal system and in society. In the face of an ever-increasing caseload, traditional instruments have been exhausted. The general impression is that the limit of cases that can be dealt with by a seat of three judges, or that can be decided on the ground of Article 81 without reasoning, has nearly been reached.<sup>43</sup> To provide for a more strategic response, the Hoge Raad itself seems to favour a rebalance between the responsibilities of legal protection on the one hand and legal uniformity and law development on the other. The general idea is that the normative role of the Hoge Raad should be strengthened and that legal protection should be restricted to control that is essential for the quality of the adjudication of lower courts. The proposals of the Committee Hammerstein are an important step in this direction.

21. Most prominent amongst these proposals is the plea for a moderate leave system and the introduction of the selection of cases 'at the gate'. Although initially this proposal seems at odds with Dutch legal tradition, on closer inspection it can be seen as one step further on the road that has already been paved by the introduction of Article 81 (decision without reasoning). Therefore, the Committee sees its own proposal as an evolutionary rather than a revolutionary step. However, the proposal of Judge Thomassen to introduce concurring and dissenting opinions – following the

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<sup>42</sup> See H. Drion, *Preadvies Handelingen 1973 der Nederlandse Juristen-Vereniging deel 1*, eerste druk, p. 46.

<sup>43</sup> *Versterking van de cassatierechtspraak*, Rapport van de commissie normstellende rol Hoge Raad, Den Haag februari 2008, p. 38.



example of the ECHR – is generally regarded as a more revolutionary one. One can of course stress the differences between, on the one hand, the position of the Hoge Raad, and, on the other, the courts that use this instrument. However, one can also emphasise that the introduction of concurring and dissenting opinions would represent a further shift in the balance between the logic of reason and the logic of power. I favour the introduction of a moderate system: not only because it would lead to better reasoned decisions, and would give relief to the judge who strongly disagrees with the majority, but mainly because it would strengthen the normative role of the Hoge Raad.<sup>44</sup> In that sense, it could play a crucial role in repairing the engine of cassation.

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<sup>44</sup> Like Leyten and Drion, I am in favour of the use of concurring and dissenting opinions. Like Drion, I think they should be published under the names of the judges, and not anonymously, as Leyten defends. However, unlike Drion, I think only the Hoge Raad (and not all courts) should use this instrument.